PP v. TIN HOCK WAN

HIGH COURT MALAYA, SHAH ALAM
WONG TECK MENG JC
[CASE NO: 42LB-8-02-2015]
5 JANUARY 2016

CRIMINAL LAW: *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 – Section 26H(1) – Harbouring smuggled persons – Allegation of – Thai nationals entered into Malaysia without legal documents – Whether there was evidence of fear or moving about or hiding from authorities – Whether elements of charge proved – Whether prima facie case established – Whether respondent ought to be called to enter defence*

CRIMINAL PROCEDURE: *Charge – Amended charge – Respondent acquitted and discharged of charge of harbouring smuggled persons without being called to enter defence – Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, s. 26H(1) – Whether respondent ought to be charged for amended charge under s. 55E of Immigration Act 1959 – Whether elements under amended charge proven – Whether prima facie case established on suggested amended charge – Whether application to amend main charge ought to be allowed*

EVIDENCE: *Witness – Recalling of witness – Respondent acquitted and discharged of charge of harbouring smuggled persons without being called to enter defence – Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, s. 26H(1) – Whether respondent ought to be called to enter defence for amended charge under s. 55E of Immigration Act 1959 – Witnesses deported back to Thailand – Whether respondent could recall witnesses – Whether calling for defence on amended charge would be prejudicial to respondent – Criminal Procedure Code, s. 162*

Two Thai nationals, namely Nithaya ('PW1') and Tamei ('PW2'), had come to Malaysia for the purpose of sightseeing and visiting PW1's sister ('Chaemei'), the respondent's wife. The respondent and Chaemei were aware that both PW1 and PW2 were without any legal documents *ie*, passport. During their stay there, Chaemei provided PW1 and PW2 with clothes, food and shelter. They were treated well by Chaemei and there was no evidence of any fear or moving about or hiding from the authorities. PW1 and PW2 stayed at Chaemei's house for four days until they were arrested by the police. The respondent was charged at the Sessions Court for harbouring two smuggled persons, an offence under s. 26H(1) of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ('the Act'). At the end of the prosecution's case, the SCJ ruled that a *prima facie* case had not been proven against the respondent. The respondent was acquitted and discharged without being called to enter defence. Hence, the present appeal by the prosecution ('the appellant'). The appellant urged the court to call for the respondent's defence on the said charge or in the alternative, on the amended

A charge under s. 55E of the Immigration Act 1959 ('IA'). The issues that arose for the court's adjudication were: (i) whether the prosecution had proven the ingredients of the charge; and (ii) whether the court should allow the amendment of the said charge to s. 55E of the IA and call for the respondent to enter his defence in the event issue (i) is answered in the negative.

B **Held (dismissing appeal):**

(1) The prosecution had only proved that the respondent had the knowledge that both PW1 and PW2 came into Malaysia without legal documents and not that both of them were smuggled into Malaysia. There should be evidence (i) at the scene of arrest showing that there was hesitation C on the part of the respondent to open the door for the police officers at the moment of arrest; and (ii) that the respondent tried to escape from the police officers to prove the knowledge and awareness that both PW1 and PW2 were smuggled persons. In fact, after the police introduced themselves as police officers, the respondent voluntarily opened the D door and let them in. PW1 and PW2 were calmly sitting at the living room. (para 24)

(2) The prosecution did not prove the ingredients of the charge/offence under the said Act and the SCJ was not in error but was correct in her decision in acquitting and discharging the respondent at the end of the E prosecution's case. It was incumbent for the prosecution to prove that it was the respondent who harboured but unfortunately it was not proven by the prosecution. The one supplying necessities to PW1 and PW2 was actually the respondent's wife and not the respondent himself. (paras 27 & 29)

F **(3)** Section 55E of the IA is intended to restrain an occupier from permitting any illegal immigrant to enter or remain in the premise. The issue of occupier was not proven by the prosecution. There was no further evidence that the respondent was the occupier of the premise which may be easily proven by the prosecution through documents such as G electricity bill, water bill and title of the property and if the respondent was only a tenant; a tenancy agreement of the premise. Hence, there was no reason for the court to call the respondent to enter his defence as there was no *prima facie* case that was made out by the prosecution on the suggested amended charge (paras 32-34)

H **(4)** The application to amend the main charge to s. 55E of the IA was not allowed. It would be prejudicial to the respondent to even call for defence for the amended charge as he would be unable to recall witnesses who had given evidence in the trial. It is mandatory under s. 162 of the Criminal Procedure Code that the accused is provided with I the right to cross-examine the prosecution witness if those witnesses are material to the concerned amendments of the charge. PW1 and PW2 as

the main and material witnesses to the prosecution's case were deported back to Thailand with no undertaking by the prosecution to re-produce them. Therefore, it was impossible for the respondent to exercise his right under s. 162 of the CPC. (paras 35-37)

Case(s) referred to:
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Koh Hak Boon v. PP [1993] 3 SLR 427 ***(refd)***

Legislation referred to:
Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, ss. 2, 26H(1), (2)
Criminal Procedure Code, ss. 162, 173(h)(ii)
Immigration Act 1959/63, ss. 6(1), 55E(1), (7)
Penal Code, ss. 26, 411

Other source(s) referred to:
Concise Oxford English Dictionary, Oxford University Press, 2006, 11th edn, pp 789, 1363
Ratanlal & Dhirajlal's Law of Crimes, 27th edn, vol 1, pp 94, 2648
The Concise Oxford Dictionary of Current English of Clarendon Press, 1995, 9th edn, p 941

For the applicant - Wan Zuraida Wan Nawan; DPP, State Legal Advisor's Office, Selangor
For the respondent - Ayasamy Velu; M/s V Samy & Co

Reported by Najib Tamby

JUDGMENT

Wong Teck Meng JC:

Introduction

[1] This is an appeal from the decision of the Sessions Court Judge (SCJ) made on 14 January 2015 in deciding that the prosecution had not proven a *prima facie* case against the respondent on the charge under s. 26H(1) of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (the said Act) for harbouring two smuggled persons namely Nithaya and Tamei in his house at No. 53, Jalan Damar Bayu 2, Glenmarie Cove, Telok Gong, Pandamaran, Klang, Selangor. The respondent was acquitted and discharged without calling for his defence.

[2] The charge against the respondent is as follows:

> Bahawa kamu di antara 12 Februari 2014 jam lebih kurang 11.00 malam sehingga 18 Februari 2014 jam lebih kurang 5.55 petang di No. 53, Jalan Damar Bayu 2, Glenmarie Cove, Telok Gong, Pandamaran di dalam daerah Klang, di dalam negeri Selangor telah melindung imigran yang diseludup iaitu Nithaya (No. Pasport: Tiada) dan Tamei (No. Pasport: Tiada) dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 26H(1) Akta Pemerdagangan Orang dan Anti Penyeludupan Migran 2007.

[3] The appellant being dissatisfied with the decision of the SCJ appealed to this court against the order of acquittal and discharge of the respondent from the above charge. The appellant urged this court to call for the respondent's defence on the said charge or in alternative on the amended charge under s. 55E of the Immigration Act 1959/63.

Facts Of The Case

[4] The prosecution relied heavily on the evidence of PW1 and PW2, Nithaya Sae Wand (PW1) and Tamai Lanak (PW2), respectively, both national of Thailand who entered into Malaysia without legal documents.

[5] PW1 and PW2 had given evidence in the court that both of them entered into Malaysia for the purpose of sightseeing and visiting PW1's sister, the respondent's wife, Chaemei. They entered into Malaysia by bus from Danok, Thailand and stopped at Klang, Selangor. Thereafter they took a taxi to PW1's sister's house.

[6] According to both PW1 and PW2, it was Suppaporn, PW1's another sister in Thailand, who told them the way to the respondent's wife's house in Klang. Upon arrival at Klang, they stayed with PW1's sister for four days until they were arrested by the police on 18 February 2014.

[7] The respondent and his wife were aware that both PW1 and PW2 are without any legal documents ie, passport, after being informed by them.

[8] During their stay there, the respondent's wife provided them with clothes, foods and shelter. They also went around sightseeing with the respondent's wife. They were treated well by the respondent's wife and there was no evidence of any fear of moving about or hiding from the authorities.

Grounds Of Appeal

[9] Upon perusal of the petition of appeal, issues to be dealt by this court are as follow:

(i) whether the prosecution has proven the ingredients of the charge; and

(ii) whether this court should allow the amendment of the said charge to s. 55E and call for the respondent to enter his defence in the event that issue (i) is answered in the negative.

Whether The Prosecution Has Proven The Ingredients Of The Charge

[10] In the context of this case, the prosecution attempts to prove that the respondent had committed the offence under s. 26H(1) of the said Act by harbouring both PW1 and PW2.

[11] Section 26H(1) provides that:

> Any person who conceals or harbours, … with the arrest of any person knowing or having reason to believe that such person is:

(a) a smuggled migrant or;

(b) a person who has …

commits an offence …

[12] As per the charge, the first ingredient of the charge that the prosecution has to prove is harbouring. The meaning of "harbour" under the section as per the charge on the respondent, is provided under s. 26H(2) of the said Act:

> "Harbour" includes supplying a person with shelter, food, drink, money or clothes, arms, ammunition or means of conveyance, or assisting a person in any way to evade apprehension.

[13] The prosecution in their case had proven the element of harbouring under the said Act. It was proved that PW1 and PW2 were provided with shelter, food, clothing during their stay in the respondent's wife's house.

[14] Next, the prosecution has to prove the element of "knowing or has reason to believe" on part of the respondent that such person is a "smuggled person".

[15] Firstly, this court looks into the element of "knowing" or "has reason to believe". According to the *Concise Oxford English Dictionary*, Oxford University Press, 2006, 11th edn at p. 1363, the word "knowing" means:

> Showing or suggesting that one has knowledge or awareness that is secret or known to only a few people.

As per the comment in *Ratanlal & Dhirajlal's Law of Crimes*, 27th edn vol. 1 p. 94; a person can be supposed to "know" where there is a direct appeal to his senses.

[16] Although the meaning of the words, "knowing" or "has reason to believe" are not defined in the said Act, it is useful as a guide to resort to the definition of "has reason to believe" in the Penal Code. Under the Penal Code s. 26, "has reason to believe" means when the person has a sufficient cause to believe that thing, but not otherwise. Similarly, interpretation of these same words in cases involving s. 411 (Dishonestly receiving stolen property) can be applied here in the interpretation of s. 26H of the said Act. Reference may be made to the case of *Koh Hak Boon v. PP* [1993] 3 SLR 427, at p. 430:

> knowledge or having reason to believe that the property is a stolen property does not involve the necessity of showing that the circumstances were such a reasonable man must have felt convinced in his own mind that the property he was dealing with was stolen property. It involves a lesser degree of conviction than a certainty and a higher one than speculation. The matters that contribute towards a person having reason to believe something are not those a court would require as proof of that thing. Whether or not a person had a reason to believe is a test to be applied by the court from the perspective of the accused. It must relate to the standards of belief of the reasonable man and not those of any

A particular accused person. However, some element of subjectivity must be involved because what might be apparent to a person with specialised knowledge of a certain field might not be apparent to a layman of even very high intelligence. The court must assume the position of the actual individual involved (that is, including his knowledge and experience) from that position like an objective reasonable man.

B

[17] A similar comment was given in *Ratanlal & Dhirajlal's Law of Crimes*, 27th edn, vol. 1 p. 2648 which states as below:

the offence made punishable is not receiving of stolen property from any particular person, but the receiving of such property knowing it to be
C stolen. The word "believe" is a very much stronger word than "suspect", and it involves the necessity of showing that the circumstances were such that a reasonable man must have felt convinced in his mind that the property with which he was dealing must be a stolen property. It was not sufficient (in such a case) to show that the accused was careless, or that he had reason to suspect that the property was stolen or that he did not
D make sufficient enquiry to ascertain whether it has been honestly acquired.

[18] The same source above gave a further interpretation on the term "has reason to believe" as it states that the words are open to the court to examine the question whether the reasons for the belief have a rational connection.
E If the circumstances are such that a reasonable man would be led by chain of probable reasoning and connect to the conclusion or inference that the subject matter did happened or occurred or existed, the person in such a circumstance is considered to have the reason to believe. I quote the comments as follow:

F A person must be held to "have reason to believe" property to be stolen within the meaning of s. 411 … when the circumstances are such that a reasonable man would be led by a chain of probable reasoning to the conclusion or inference that the property he was asked to deal was stolen property, although the circumstances may fall short of carrying should conviction to his mind on the point.

G

[19] Looking into another important element of s. 26H of the said Act is the harbouring of "smuggled migrant". The term "smuggled migrant" according to s. 2 interpretation clause of the said Act means:

means a person who is the object of the act of smuggling of migrants,
H regardless of whether that person participated in the act of smuggling of migrants.

[20] To further strengthen the point, "smuggled", according *Concise Oxford English Dictionary*, Oxford University Press, 2006, 11th edn at p. 789 means "to take, send or bring goods secretly and illegally into or out
I of country".

[21] Both PW1 and PW2 entered into Malaysia by themselves freely and voluntarily together with the reason that they came into Malaysia for sightseeing and to visit the respondent's wife as extracted from the evidence clearly indicates that they were not smuggled into Malaysia.

[22] This point was put to the investigating officer, PW4, Tn Ravi a/l Prumal (ASP) (IC No: G13615), during his cross-examination, and his answers are reproduced as follow:

Q : Apakah maksud penyeludupan migran?

A : Mendatangkan seseorang ke dalam Malaysia tanpa sebarang dokumen sah.

Q : Sekiranya seseorang itu datang sendiri ke Malaysia secara sukarela tanpa dokumen yang sah, adakah ini bukan penyeludupan?

A : Bukan penyeludupan.

This simply supports the fact that the victims entered into Malaysia by themselves and the act of entering into Malaysia by themselves is not an act of smuggle, as confirmed by PW4.

[23] Keeping in mind the interpretation derived earlier on, in order to prove the existence of the words of "knowing or has reason to believe", an applicable test to satisfy this court's enquiry of such words is whether the respondent has the knowledge or awareness or a sufficient cause to believe that PW1 and PW2 are smuggled person?

[24] A husband to PW1's sister, the respondent is definitely in a sufficient cause and circumstance for a reasonable man at his position to know and aware that both PW1 and PW2 are smuggled persons. However, from the evidence, the prosecution had only proved that the respondent has the knowledge that both PW1 and PW2 came into Malaysia without legal documents and not that both of them were smuggled into Malaysia. On the contrary, there should be evidence at the scene of arrest showing that there was hesitation on the part of the respondent to open the door for the police officers at the moment of arrest, there should have been evidence showing that at least the respondent tried to escape from the police officers to prove the knowledge and awareness that both PW1 and PW2 are smuggled person. In fact, the respondent, after the police introduced himself as a police officer, voluntarily opened the door and let them in. Other than that, PW1 and PW2 are calmly sitting at the living room watching over PW1's niece and sweeping the floor.

[25] The evidence from the prosecution to establish the charge lost more weight when there was not even evidence to show that both PW1 and PW2 were smuggled migrants. Hence, this court is satisfied that the test as discussed is not fulfilled by the prosecution in order to establish the charge against the respondent.

[26] Departing from the issue of proving the elements of the charge, as a matter of law, it is important that the charge is framed against the correct person. The prosecution has to prove that the respondent was the person harbouring PW1 and PW2, whether he did the act of supplying a person with shelter, food, drink, money or clothes, arms, ammunition or means of conveyance, or assisting a person in any way to evade apprehension as laid down in s. 26H(2) of the said Act. From the evidence of PW1 and PW2, they testified that it was the respondent's wife who provided them with clothing, foods and shelter. I now reproduce the relevant part of evidence which confirms that it was the respondent's wife that provided them with all the necessities during their stay at the respondent's wife's house:

Q : Selepas kakak jemput masuk ke rumah, apa yang berlaku selepas itu?

A : Selepas masuk ke dalam rumah, saya tolong bantu jaga anak-anak Chaemei dan kadang-kadang ada dibawa keluar bersiar-siar.

Q : Semua keperluan kamu telah dijaga oleh Chaemei sepanjang kamu tinggal di rumah tersebut.

A : Setuju.

For PW2:

Q : Selepas sampai di rumah kakak Nithaya, apa yang berlaku?

A : Nithaya bantu kakak dia jaga rumah dan anak-anak kakak dia.

Q : Kakak Nithaya yang telah menjaga kamu dan Nithaya dengan memberi makanan, pakaian, selama 4 hari kamu berada di rumah tersebut.

A : Setuju.

[27] From evidence, it is clear that, the one supplying necessities to PW1 and PW2 was actually the respondent's wife and not the respondent himself. It is incumbent for the prosecution to prove that it was the respondent who harboured, but unfortunately, it was not proven by the prosecution.

[28] Hence, applying the case of *Balachandran v. PP* [2005] 1 CLJ 85 at p. 100; [2005] 2 MLJ 301 at p. 316:

> The test at the close of the case of the prosecution would therefore be: is the evidence sufficient enough to convict the accused if he elects to remain silent? If the answer is in affirmative then a *prima facie* case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt, then there can be no *prima facie*. As the accused can be convicted on the *prima facie* evidence it must have reached a standard which is capable of supporting a conviction beyond reasonable doubt.

[29] This court therefore finds that the prosecution did not prove the ingredients of the charge/offence under the said Act and that the SCJ was not in error but was correct in her decision in acquitting and discharging the respondent at the end of the prosecution's case.

Whether This Court Should Allow The Amendment Of The Said Charge To s. 55E And Call For The Respondent To Enter His Defence In The Event That Issue No. 1 Is Answered In The Negative

[30] The prosecution urged this court to call the respondent to enter defence for the charge but if the court finds that there is no case of s. 26H(1) of the said Act then then the court should amend the charge to s. 55E of the Immigration Act 1959/63 (the amended charge) as provided under s. 173(h)(ii) Criminal Procedure Code, and calls for the respondent's defence.

[31] After considering the ingredients of the suggested amended charge, my duty is to determine whether the prosecution has proven a case under the said charge. Section 55E(1) is as follow:

> No Occupier shall permit any illegal immigrant to enter or remain at any premises."

And the meaning of "illegal immigrant" is provided under s. 55E(7) of the Immigration Act 1959/63 as follow:

> illegal immigrant means a person, other than a citizen, who contravenes section 5, 6, 7, 8, 9 or 15 of this Act or Regulation 39 of the Immigration Regulation 1963;

From the evidence, it is not disputed that they are the illegal immigrant as they had contravened s. 6(1) of the Immigration Act that reads as follow:

> No person other than a citizen shall enter into Malaysia unless:
>
> (a) he is in possession of a valid Entry Permit lawfully issued to him under s. 10;

This was admitted by both PW1 and PW2 that they entered into Malaysia from Danok Thailand without any legal documents.

[32] However, the section is intended to restrain an occupier from permitting any illegal immigrant to enter or remain in the premise. It is my considered view that the issue of occupier was not proven by the prosecution. According to *The Concise Oxford Dictionary of Current English of Clarendon Press 1995*, 9th edn. at p. 941, "occupier" is a person or company residing in or using a property as its owner or tenant. Or (illegally) as a squatter.

[33] The prosecution did not prove that the respondent is the occupier of the premise where PW1 and PW2 were arrested. The only evidence given was from PW3, ASP Mohd Rusdham, that the person who answered the door at the time of the arrest was the respondent. There was no further evidence that the respondent was the occupier of the premise which may be easily proven by the prosecution through documents such as electricity bill, water bill, and title of the property, and if the respondent is only a tenant; a tenancy agreement of the premise. All these were not proven by the prosecution.

[34] Hence, there is no reason for this court to call the respondent to enter his defence as there was no *prima facie* case that was made out by the prosecution on the suggested amended charge.

[35] In addition, to even call for defence for the amended charge, it would be prejudicial to the respondent who is unable now to recall witnesses who had given evidence in the trial. Section 162 of the Criminal Procedure Code (CPC) reads as follows:

> wherever a charge is altered or added by the Court after the commencement of the trial the prosecutor and the accused shall be allowed to recall or re-summon and examine, with reference to the alteration or addition, any witness who may have been examined and may also call any further evidence which may be material.

[36] It is mandatory under the section that the accused is provided with the right to cross-examine the prosecution witness if those witnesses are material to the concerned amendments of charge. PW1 and PW2 as the main and material witnesses to the prosecution's case were deported back to Thailand with no undertaking by the prosecution to reproduce them.

[37] It is therefore impossible for the respondent to exercise his right under s. 162 of the CPC, and as such extremely prejudicial to the respondent's case. The application by the appellant to amend the main charge to s. 55E of the Immigration Act 1959/63 is not allowed.

Conclusion

[38] Based on the above reasons, the prosecution's appeal is dismissed.